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NO. _____

IN THE SUPREME COURT OF

THE UNITED STATES OF AMERICA

OCTOBER TERM 1983

L. G. MOORE,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED
STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FOR L. G. MOORE

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QUESTIONS PRESENTED FOR REVIEW

1. Should the indictment have been dismissed or an acquittal ordered because federal jurisdiction, which enabled the Government to prosecute Petitioner under the Travel Act, was furnished solely by behavior of undercover agents?
2. Whether the Government's conduct was so egregious in luring Petitioner to commit bribery that an acquittal should have been ordered on the grounds of Due Process?
3. Whether the District Court violated Petitioner's rights under the Confrontation Clause in admitting inadmissible, tape-recorded, hearsay evidence?

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OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 716 F.2d 257 (5th Cir. 1983). There is no opinion of the District Court as such case was tried before a jury.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1983. A petition for rehearing was denied November 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. Const. amend. V
2. U.S. Const. amend. VI
3. 18 U.S.C. §1952

(See Appendix - Above is set out verbatim)

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

Defendants, L. G. Moore and John Garrett, were indicted in a four count indictment on May 26, 1981, in Houston, Texas for conspiracy to violate, and violating the Travel Act, 18 U.S.C. §1952. As a result of the aforesaid indictment, original jurisdiction existed with the District Court located in the Southern District of Texas, Houston Division. Defendants' trial to a jury began on January 12, 1982, and on February 25, 1982, the jury returned a guilty verdict against both Defendants on count three, a substantive Travel Act violation. The jury was unable to reach a decision on counts one and four. (The Defendants were not arraigned on the second count.) Both Defendants were sentenced to five years probation,

required to perform three hundred fifty hours of community service, and pay a Ten Thousand Dollar fine. Petitioner Moore timely appealed to the Fifth Circuit Court of Appeals. Moore's appeal was denied on September 19, 1983. He then timely filed a petition for rehearing which was subsequently denied on November 22, 1983.

(ii) Statement of Facts

On February 5, 1979, Joseph Hauser pleaded guilty to federal criminal charges arising from a scheme to swindle health, welfare, and pension funds from labor unions. See United States v. Hauser, No. CR-78-1313 (D. Ariz., 1979). At about the same time, Hauser willingly agreed to participate with F.B.I. agents in the undercover operation which has become commonly known as Brilab. In return, Hauser received the assistance of Justice Department

attorneys at his sentencing, substantial compensation, reimbursement of expenses, other fringe benefits during his participation in the investigation, and the benefits of the federal witness protection program.

The resulting Brilab investigation was supposed to be centered upon suspected illegal activities of labor union officials. Hauser and two F.B.I. agents, Mike Wacks and Larry Montague, established a bogus insurance agency known as Fidelity Financial Consultants in Beverly Hills, California, in mid-April, 1979. A cover was arranged whereby Fidelity would purport to represent Prudential Insurance Company. In reality, there was no such organization as Fidelity, and Fidelity had no connection with Prudential or any other insurance company. The plan was for Hauser, with the assistance of the

agents, to expose corruption among labor leaders by bribing them to acquire insurance for their unions through Fidelity.

After unsuccessful efforts in Southern California, Hauser expanded his field of operations to Texas. A previous acquaintance in Waco referred Hauser to Harold Grubbs in Houston. On July 5, 1979, Hauser met with Grubbs, and they concocted a plan to contact Defendant L. G. Moore, a labor leader, in order to obtain insurance business from Moore's labor unions. Although Moore had no prior criminal record, Grubbs described him as "on the take."[1] On September 20, a meeting was held between Moore, Hauser,

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[1]It is the admission into evidence of the tape recording of this conversation, together with a similar tape between Hauser and Grubbs, which is complained of as a violation of Moore's rights under the Confrontation Clause.

and Wacks. At this meeting, Moore was offered substantial inducements in exchange for procuring labor union insurance contracts. These "inducements", among other things, amounted to some six hundred thousand dollars per year in payment of commissions for the sale of an insurance policy to the State of Texas and promises of like renumeration for other such sales.

On October 17, Moore introduced Hauser, Wacks and Montague to co-defendant Garrett. Moore referred to Hauser and the agents as his friends and solicited Garrett's aid in obtaining insurance business for Prudential. After a discussion arose about the possibility of procuring a county contract, Hauser inquired about the insurance for the city of Houston. Garrett then called City of Houston Councilman Jim Westmoreland, and asked him whether a deal could be worked

out. Subsequently, Moore and Garrett attempted to "encourage" Westmoreland to accept Prudential's bid for the City of Houston's insurance contract.

Meanwhile, at the time of these discussions, the Houston City Council was negotiating and soliciting bids in preparation for the January, 1980 expiration of insurance coverage of 25,000 city employees. Without consulting the government agents posing as Prudential/Fidelity agents, Prudential Insurance Company had itself prepared a bid, as did at least four other major companies. The Texas Municipal League (the "League"), a commission representing over two hundred cities in Texas that sought to combine the bargaining power of the cities in order to obtain favorable insurance coverage for the municipalities, independently reviewed the insurance available and, coincidentally,

adopted Prudential's plan. The contract finally signed by the City Council on December 26, 1979 was with the League, which contracted with a Texas insurance company that in turn contracted with Prudential to provide the coverage. (It is clear that the League had nothing to do with the efforts to bribe Westmoreland, and that it had independently selected what it considered the best coverage at the lowest price.)

The next day, December 27, Moore called agent Wacks at the Fidelity offices in Beverly Hills, California.[2] Moore told Wacks that the contract was to be voted on <u>that</u> day (although Moore had been present at the council meeting the day <u>before</u>, at which the Council voted in

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[2]This is the interstate telephone call upon which the present federal Travel Act indictment is based.

favor of the Prudential contract), and that they needed an extra $10,000 to commit a couple more councilmen. Wacks agreed to pay this sum.

Moore called again the same day, left a message, and Wacks returned the call. Moore then told him that the contract had just been awarded at a premium of $12 million (of which the agreed commission for the agents and the defendants was ten percent).

ARGUMENT

(i) Should the indictment have been dismissed or an acquittal ordered because federal jurisdiction, which enabled the Government to prosecute Petitioner under the Travel Act, was furnished solely by behavior of undercover agents?

In Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed. 2d 493 (1971), this Court held that the interstate commerce element giving rise

to federal jurisdiction under the Travel Act should be scrutinized so as to prevent such Act from altering sensitive federal-state relationships, overextending limited federal public resources, and transforming relatively minor state offenses into federal felonies. In so holding this Court recognized the tenuous nature of the interstate nexus and seemed to categorize situations where the interstate element was a "matter of happenstance" as those instances where jurisdiction cannot be supported under the Travel Act. Id., 401 U.S. at 812, 91 S.Ct. at 1059, 28 L.Ed. 2d at 493.

In United States v. Archer, 486 F.2d 670 (2d Cir. 1973), the Second Circuit, in adhering to Rewis, supra, recognized that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard of review is needed

than when the interstate nexus is provided by the defendants themselves. This is so because the legislative purpose in instituting the Travel Act was not to extend federal power to deal with corruption in local prosecutor's offices merely as a result of fortuitous interstate contact between an undercover agent and corruptor. Id. at 685. Logically, if Rewis stands for the proposition that an expansive interpretation should not be given to the interstate nexus, then it is axiomatic that a similar narrow interpretation should be given when a Federal undercover agent plays a role in establishing Travel Act jurisdiction. The Second Circuit takes Rewis, justifiably, one step further by requiring a stricter standard in reviewing the federal element.

However, the Fifth Circuit (in contrast to the Second Circuit), has

adopted a more lax standard in scrutinizing the federal element giving rise to Travel Act jurisdiction. Thus a discrepancy exists as to the proper level of review concerning the interstate nexus invoking Travel Act jurisdiction. The Fifth Circuit in deciding the case at hand, has rejected the Archer "stricter standard" for testing the sufficiency of the interstate element when government agents are involved. Even though the Court stated that it does not expressly adopt or reject the Archer, "stricter standard", United States v. Garrett, 716 F.2d 257, 267 (5th Cir. 1983), in reality it rejects such standard. Rather than applying a stricter standard for testing the sufficiency of the interstate element, the Fifth Circuit merely scrutinizes the government's apparent reasons for its actions and forbids the government agent's movement out-of-state solely

to manufacture Travel Act jurisdiction. Id. at 267. Moreover, contrary to the Second Circuit, the Fifth Circuit interprets the Travel Act as not excepting "casual, incidental, or happenstance" interstate contacts. Id. at 267 n.5.

The interstate nexus, in which the Fifth Circuit found Travel Act jurisdiction, was predicated on an interstate telephone call made by Petitioner, who was in Texas, to federal undercover agent Wacks who was in California. In line with Fifth Circuit precedent, the Court found that since Agent Wacks did not fly out to California just to receive a telephone call from Petitioner Moore, coupled with the fact that Petitioner Moore was aware of Agent Wacks' California insurance company when he phoned Wacks, Travel Act jurisdiction existed. Id. at 267.

Yet, the Second Circuit, adopting an

Archer "stricter standard", would have inquired further than the Fifth Circuit. An apt illustration can be seen by comparing the scenario of Petitioner Moore's phone call with two of the telephone calls discussed in Archer. In the Paris call,[3] as in Petitioner's call, the federal agent traveled out-of-state for purposes other than manufacturing jurisdiction, a matter of happenstance. In Archer, the Second Circuit spoke directly to this point:

> "The Government places great weight on the fact that Bario (the agent) was in Paris on legitimate

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[3]In Archer, a federal agent had been working undercover in New York. During the pendency of his investigation in New York, he went to Paris, France on another investigation. While in Paris, the agent called a defendant in New York. The agent's call to New York was one of three out-of-state calls in which the Government sought to invoke Travel Act jurisdiction. United States v. Archer, supra at 673.

> business and was not sent there solely to manufacture jurisdiction in this case. But that fact alone is not sufficient to qualify the Paris call. Any such holding would permit the Government to convert any local bribery it had provoked into a federal offense by furnishing an out-of-state address for an undercover agent or sending him outside the state on a legitimate errand and having a call made before the offense was consumated." (Emphasis added is ours).

United States v. Archer, supra at 685.

Furthermore, in the Las Vegas call,[4] as in Petitioner's call, a defendant in-

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[4]While in New York, the undercover agent told a co-defendant, who was a bondsman, that he was from Las Vegas and that he was going out of town and could be reached at a certain Las Vegas hotel. The bondsman, in need of talking to the agent, repeatedly called the Las Vegas hotel. However, the bondsman never talked to the agent during his interstate calls because unbeknownst to the bondsman, the fact that the agent could be reached at the Las Vegas hotel was a government plant of misinformation.

itiated the phone call. The sole distinction being that Petitioner actually talked to the agent, while in Archer, the bondsman did not. Yet, based on this distinction, the Second Circuit would not have ruled differently. Id. at 682 n. 14. The Fifth Circuit argues that since Petitioner was aware of agent Wacks' California insurance company at the time of the phone call, jurisdiction exists. Meanwhile, the bondsman in Archer had the same subjective belief that the agent could be reached out-of-state and jurisdiction was still wanting.

Based on Archer, it is apparent that if Petitioner's appeal had been before the Second Circuit, the indictment would have been dismissed. The stricter standard applied by the Second Circuit is definitely a matter of line-drawing. Yet, the import of Archer is clear, the defendants must cause the interstate

commerce element; it cannot be manufactured by an undercover agent who gives a defendant an out-of-state telephone number and as a matter of happenstance travels to the location of the out-of-state telephone number and subsequently receives a call from the defendant. Especially where such phone call may have been made intrastate, but for the matter of happenstance.[5]

While such interstate nexus would have been given a stricter standard of scrutiny resulting in a dismissal of the indictment in the Second Circuit, the Fifth Circuit has refused to adopt such a standard. As a result, the Fifth Circuit has rendered a decision in conflict with

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[5]The Fifth Circuit believes that the Travel Act does not except "casual, incidental, or happenstance" interstate contacts. United States v. Garrett, supra at 257 n. 5.

the decision of the Second Circuit. The obvious need for this Court to grant certiorari and reconcile the two circuits becomes apparent upon reading a footnote written by Judge Tate which appears within his panel opinion of the instant case:

> "Further, in the author's personal view, the federalizing of the state bribery offense - itself spawned and created by governmental inducements of this nature and magnitude - is an unjustifiable expansion of the congressionally - intended reach of the Travel Act, especially where federal jurisdiction is founded upon a single interstate telephone call to a government agent (where the government had itself initiated the initial interstate contact with the Texas defendant). Again, however, I feel compelled by the precedents of this circuit to find Travel Act jurisdiction in the present case. (Emphasis added is ours).

United States v. Garrett, 716 F.2d 257,

275 n. 10 (5th Cir. 1983).

(ii) Whether the Government's conduct was so egregious in luring Petitioner to commit bribery that an acquittal should have been ordered on the grounds of Due Process?

In United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973), this Honorable Court stated, "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Petitioner asserts that the instant case is such a situation. Moreover, so does Judge Tate who wrote the panel opinion in United States v. Garrett, supra. In Garrett, Judge Tate states the following:

> "Although this conclusion seems required by precedent of this circuit, the

> author of this opinion, expressing views personal to him alone of the panel, insofar as he knows, feels obliged to note that, were he writing on a clean slate, he would feel that the defendants due process rights were violated by their conviction of government-created crimes spawned from an enterprise of this magnitude formed solely for the purpose of inducing individuals to commit crimes through inordinately large financial inductments, whatever the predisposition of the individuals so ensnared."

Id. at 275 n. 10.

In an attempt to lure Petitioner to bribe City of Houston Councilman Westmoreland to vote to accept Prudential's bid for the City of Houston insurance contract, undercover agents offered him the following: six hundred thousand dollars per year; admission of one of his sons into Georgetown Law School; and the opportunity of becoming the next General President of the International Union of

Operating Engineers. As a result of said inducements, at trial, Petitioner raised the defense of entrapment. Nevertheless, the jury, unable to reach a verdict on two counts, came back with a guilty verdict on count three, a substantive Travel Act violation.

Yet, the fact that the jury rejected Petitioner's entrapment defense should not preclude Petitioner from arguing that the government's conduct was so outrageous as to violate due process. Since the defense of entrapment was first recognized in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932) this Court has been split on whether the focus of the inquiry should be on defendant's predisposition or on the conduct of the government agent. United States v. Webster, 649 F.2d 346, 348 n. 3 (5th Cir. 1981). While some members of this Court seem to suggest

that outrageous government conduct can never be made a defense if a defendant is found to be predisposed to committing the criminal act, Hampton v. United States, 425 U.S 484, 492, 96 S.Ct. 1646, 1651, 48 L.Ed. 2d 113 (1976), other members disagree. Justices Powell and Blackmun, after noting that this Honorable Court has never had occassion to confront a Government overinvolvement case in an area outside the realm of contraband, both state that they are unwilling to conclude that such a due process argument can never be made if a defendant is found to be predisposed to committing the criminal act. Id. 425 U.S. at 493, 96 S.Ct. at 1651.

Furthermore, logic would suggest that the outrageousness of the government conduct should be considered as a defense even if a defendant is so predisposed. This is because the amount of Government

inducements begs the question as to whether an individual was predisposed to committing a criminal act. For instance, Mr. R. may be offered $100.00 to deface government property and refuse. Yet, Mr. R. may be offered $600,000.00 to deface the same property and agree. The fact that Mr. R. initially refuses to deface property for $100.00 seems to suggest that he is not predisposed to doing such an act. However, if Mr. R. would be willing to deface the same property for $600,000.00, there is some indication that there exists a certain price where he would be predisposed to committing such an act. It is illogical and against human nature to assume that most people are not predisposed to committing illegal acts when substantial inducements are at stake.

The jury, in rejecting Petitioner Moore's entrapment defense, arguably

believed that Moore was predisposed to committing bribery for a substantial sum. However, it was the substantial nature of the inducements which enticed Petitioner's ill motivated greed. Surely this Court should grant certiorari to decide whether substantial government inducements can be so unreasonable as to violate due process.

(iii) Whether the District Court violated Petitioner's rights under the Confrontation Clause in admitting inadmissible, tape-recorded, hearsay evidence?

At the trial, over proper objection, the Government was permitted to introduce the unsworn, surrepitiously tape recorded, hearsay statements of Harold Grubbs describing Petitioner Moore. The playing of these tapes, which consumed the major portion of a trial day, allowed the jury to hear numerous statements

similar to the following:

GRUBBS: "...Now this guy is the head of five states for the operating engineers. Got a lot of fucking members. Ah, and he can, he'll he'll deal."

GRUBBS: "Bottom line, he'll deal."

GRUBBS: "...Now this son of a bitch here you can deal with. One on one, just like you deal with me."

GRUBBS: "But, now this guy, L. G. Moore, I was telling you about, you can do business with him. Just like you're doing it with me and never have to worry about nothing."

GRUBBS: "But you see, you have to know these people and I know 'em, I know who's on the take and I know who's straight and I know all the whole fuckin' deal, and I'll tell you."

Before said tapes were introduced into evidence, counsel for Petitioner objected and stated that said tapes constituted inadmissible hearsay. Moreover, counsel told the District Judge that since declarant Grubbs was unavailable to testify, introduction of the tapes would violate Petitioner's Sixth Amendment

right of confrontation. On appeal the Fifth Circuit, in response to Petitioner's above said claims, ruled that the introduction of the aforementioned tapes constituted error in that they were inadmissible hearsay. United States v. Garrett, supra, at 273. However, they went on to state that such error was harmless.

Even though the Fifth Circuit panel recognized that Petitioner sought a reversal with respect to the Grubbs' tapes on the basis that his Sixth Amendment Confrontation rights were violated because Grubbs was unavailable for cross-examination, Id. 273, the panel decision failed to comment on this issue. Instead, their line of inquiry was limited to the hearsay nature of said tapes. In Dutton v. Evans, 400 U.S. 74, 86, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970), this Honorable Court stated that the

hearsay law is not to be "equated" with the right of confrontation. "The Sixth Amendment's right of an accused to confront the witnesses against him is ...a fundamental right...." Pointer v. Texas, 380 U.S. 400, 404 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965). A right which Petitioner was denied!

In addressing his Confrontation claim, Petitioner would note that the instant case is analogous to Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968). There, this Court reversed the robbery conviction of a defendant where his involvement in the crime was explained by a Postal inspector who allegedly heard a co-defendant's oral confession. In Bruton, the declarant's statements were proof on an ultimate fact issue: involvement in the crime. Here, Grubbs' statements were proof on an ultimate fact

issue: predisposition to commit the crime. Thus, Petitioner like Bruton, was denied an opportunity to confront his accuser.

Nor can the denial of Petitioner's Confrontation rights be considered harmless error. In Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed. 2d 171 (1963) Chief Justice Warren stated:

> The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), a decision similar to the case at bar both in the frequency of the highly prejudicial evidence, and its influence upon a "substantial right," the Court, in an opinion expressing the views of seven of its members wrote that it must be proven:

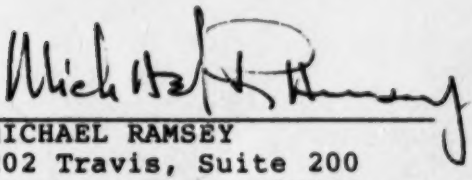
> ...beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. 386 U.S. at 24.

The fact that the jury deliberated for four days and was only able to reach a verdict on one of three counts demonstrates the closeness of the case. There can be little argument that the issue of whether Petitioner was "predisposed" to engage in his conduct was very difficult to resolve because the Government's proof on this issue was not strong. It is evident that the Chapman standard was not met. Therefore, this Court should grant certiorari and restore Petitioner's Sixth Amendment right of confrontation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that three true and correct copies of the foregoing Petition for Certiorari for L. G. Moore were delivered by United States Mail to the Solicitor General, Department of Justice, Washington, D.C. 20530 (certified return receipt requested #P269 163 529); Mr. Ron Woods, Assistant United States Attorney at 515 Rusk, Houston, Texas 77002 (certified return receipt requested #P269 163 530); and to Mr. Richard Haynes, Attorney for John Garrett, at 2701 Fannin, Houston, Texas 77002 (certified return receipt requested #P269 163 531) on this the 19th day of January, 1984.

MICHAEL RAMSEY